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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID DARST,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A04-0606-CR-341
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0103-CF-74367

February 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David Darst appeals his sentence after pleading guilty to one count each of Robbery, Criminal Confinement, and Possession of a Firearm by a Serious Violent Felon (“SVF”), all as Class B felonies. He presents one issue for our review, namely, whether his aggregate sentence is appropriate considering the nature of the offense and his character.

The State presents one issue on cross-appeal, namely, whether the trial court abused its discretion when it granted Darst’s motion to file a belated appeal.

We dismiss.

FACTS AND PROCEDURAL HISTORY

On June 11, 2001, Darst pleaded guilty under a written plea agreement to robbery, criminal confinement, and possession of a firearm by an SVF, all as Class B felonies. The agreement left sentencing to the trial court’s discretion. On July 13, 2001, the trial court sentenced Darst to twenty years on the robbery count and ten years each for criminal confinement and possession of a firearm by an SVF. The trial court ordered the latter two sentences to be served concurrently but consecutive to the twenty-year sentence, for an aggregate sentence of thirty years.

On November 28, 2001, Darst filed a pro se motion for a transcript of the guilty plea hearing in order to prepare a claim for post-conviction relief. The trial court denied that motion without a hearing on the ground that there was “nothing pending.” Appellant’s App. at 64. On May 24, 2006, Darst filed a pro se motion to compel the production of documents and a pro se motion for permission for leave to file a belated

notice of appeal.¹ On June 2, Darst again filed a pro se motion for transcripts of the guilty plea proceedings. The trial court denied the motion for transcripts without a hearing, noting again that there was “nothing pending.” Appellant’s App. at 67. The State filed its Answer to Motion to Appeal Sentence, objecting to Darst’s request to file a belated notice of appeal. On June 14, 2006, the trial court granted Darst’s motion to file a belated appeal,² and Darst filed his belated notice of appeal on June 26.

DISCUSSION AND DECISION

Cross-Appeal³

The State contends that the trial court abused its discretion when it granted Darst permission to file a belated notice of appeal. Thus, the State argues that Darst’s appeal should be dismissed for lack of jurisdiction. Darst counters that the State should not be permitted to raise the issue on cross-appeal. We address Darst’s contention first.

Darst cites to Indiana Code Section 35-38-4-2 in support of his contention that the State has no right to appeal from an order granting a petition for leave to file a belated notice of appeal. That section enumerates the circumstances under which the State is entitled to appeal from a criminal proceeding. But this court has previously held that “a petition to file a belated notice of appeal is authorized and governed by the Post-Conviction Rules; consequently, the proceeding . . . is properly characterized as a post-

¹ A copy of each motion is in Appellant’s Appendix, but we note that the Chronological Case Summary contains entries for rulings on, but not the filing of, these motions.

² There is no indication in the record that the trial court explicitly ruled on Darst’s May 24, 2006 motion to compel the production of documents.

³ Because the issue raised by the State on cross-appeal implicates this court’s jurisdiction and is dispositive, we address only that issue.

conviction proceeding rather than a criminal proceeding.” Beatty v. State, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006) (citation omitted). “Thus, the State’s right to cross-appeal from an order granting such a petition is governed by rule rather than statute.” Id. Here, as in Beatty, “nothing in the [Indiana] Appellate Rules otherwise limits the State’s ability to cross-appeal under these circumstances.” See id. Thus, as we also concluded in Beatty, the State is “authorized to appeal from an order granting a defendant’s petition to file a belated notice of appeal.” See id. at 410.

We next turn to the State’s contention that Darst should not have been permitted to file a belated notice of appeal. As noted above, the filing of a belated notice of appeal is governed by Indiana Post-Conviction Rule 2. That rule provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

P-C.R. 2(1). There are no set standards defining delay and each case must be decided on its own facts. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). “Factors affecting this determination include the defendant’s level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay.” Id.

Whether a defendant is responsible for the delay is a matter within the trial court's discretion. Id. "Although we acknowledge that the trial court is generally in a better position to weigh evidence and judge witness credibility and we defer to that discretion, such is not always the case." Id. Where, as here, the trial court did not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only bases for that decision are the allegations contained in the motion to file a belated notice of appeal. See id. Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings. Id. Thus, we review the grant of Darst's motion de novo. See id.

The State contends that the trial court erred when it allowed Darst to file a belated notice of appeal. Initially, we note that Darst, in his motion to file a belated appeal, alleged that his failure to file a timely notice of appeal was not his fault because he had not been advised of the right to appeal his sentence by the court or his defense counsel. He also stated that he had "[o]nly recently" been advised of that right and then diligently requested permission to file a belated notice of appeal. The State filed a response, alleging only that there was "no legal or factual reason to permit [Darst] to file a Belated Notice of Appeal." Appellant's App. at 83.

The trial court was faced with competing allegations that were unsupported by citations to evidence. But, in his motion for leave to file a belated notice of appeal, Darst alleged the necessary prima facie allegations to warrant, at a minimum, a hearing to allow him the opportunity to present evidence showing that he had met the requirements of Post-Conviction Rule 2. See Welches v. State, 844 N.E.2d 559, 562 (Ind. Ct. App. 2006); Jackson v. State, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006). Nevertheless, we

need not address whether the trial court abused its discretion when it granted Darst's motion, without a hearing, because the transcript contradicts Darst's claim that he was not advised of the right to appeal his sentence.

The following colloquy took place at Darst's guilty plea hearing:

Court: When you plead guilty, you give up your right to an appeal. Do you understand that?

Mr. Bowling:⁴ Judge, if I may interject, my understanding is that certainly Mr. Darst under the plea waives his right to appeal any conviction. I believe that if he should feel that he is given a sentence that is contrary to law, he would have the right to appeal his sentence.

Court: He does. But he gives up the right to appeal his conviction. Do you understand that?

Defendant: Yes.

Transcript at 20. Thus, Darst's contention, both in his motion for leave to file a belated appeal and on appeal, that neither the trial court nor his attorney advised him of his right to appeal his sentence is without merit.

Because Darst was informed at the guilty plea hearing that he could appeal his sentence, he has not shown that the five-year delay in seeking leave to file a belated notice of appeal was not his fault or that he was diligent in requesting leave to file a belated notice of appeal. And because he does not meet those requirements of Post-Conviction Rule 2, we are without jurisdiction to entertain his appeal. Thus, we must dismiss Darst's appeal.

Dismissed.

MAY, J., and MATHIAS, J., concur.

⁴ Bowling represented Darst at the guilty plea hearing.